

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

PATRICIA A. S.,

Plaintiff,

v.

Civil Action No.
8:20-CV-0434 (DEP)

COMMISSIONER OF SOCIAL SECURITY,

Defendant.

APPEARANCES:

OF COUNSEL:

FOR PLAINTIFF

CONBOY McKAY LAW FIRM
307 State Street
Carthage, NY 13619

LAWRENCE D. HASSELER, ESQ.

FOR DEFENDANT

SOCIAL SECURITY ADMIN.
625 JFK Building
15 New Sudbury St
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MICHAEL L. HENRY, ESQ.

DAVID E. PEEBLES
U.S. MAGISTRATE JUDGE

ORDER

Currently pending before the court in this action, in which plaintiff seeks judicial review of an adverse administrative determination by the

Commissioner of Social Security (“Commissioner”), pursuant to 42 U.S.C. §§ 405(g) and 1383(3)(c), are cross-motions for judgment on the pleadings.¹ Oral argument was heard in connection with those motions on July 7, 2021, during a telephone conference conducted on the record. At the close of argument, I issued a bench decision in which, after applying the requisite deferential review standard, I found that the Commissioner’s determination resulted from the application of proper legal principles and is supported by substantial evidence, providing further detail regarding my reasoning and addressing the specific issues raised by the plaintiff in this appeal.

After due deliberation, and based upon the court’s oral bench decision, which has been transcribed, is attached to this order, and is incorporated herein by reference, it is hereby


ORDERED, as follows:

1) Defendant’s motion for judgment on the pleadings is
GRANTED.

¹ This matter, which is before me on consent of the parties pursuant to 28 U.S.C. § 636(c), has been treated in accordance with the procedures set forth in General Order No. 18. Under that General Order once issue has been joined, an action such as this is considered procedurally, as if cross-motions for judgment on the pleadings had been filed pursuant to Rule 12(c) of the Federal Rules of Civil Procedure.

2) The Commissioner's determination that the plaintiff was not disabled at the relevant times, and thus is not entitled to benefits under the Social Security Act, is AFFIRMED.

3) The clerk is respectfully directed to enter judgment, based upon this determination, DISMISSING plaintiff's complaint in its entirety.

A handwritten signature in black ink, appearing to read "David E. Peebles", written over a horizontal line.

David E. Peebles
U.S. Magistrate Judge

Dated: July 12, 2021
Syracuse, NY

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

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PATRICIA A. S.,

Plaintiff,

vs.

8:20-CV-434

COMMISSIONER OF SOCIAL SECURITY,

Defendant.
-----x

Transcript of a **Decision** held during a
Digitally-Recorded Telephone Conference on July 7,
2021, the HONORABLE DAVID E. PEEBLES, United States
Magistrate Judge, Presiding.

A P P E A R A N C E S

(By Telephone)

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1 (The Court and all counsel present by
2 telephone, 11:11 a.m.)

3 THE COURT: I appreciate the excellent
4 presentations of both counsel, both through their written
5 briefs and orally.

6 I have before me a challenge to an adverse
7 determination by the Commissioner of Social Security finding
8 that plaintiff was not disabled at the relevant times and
9 therefore ineligible for the benefits which she sought. The
10 challenge is raised pursuant to 42 United States Code
11 Sections 405(g) and 1383(c)(3).

12 The background is as follows: Plaintiff was born
13 in March of 1975 and is currently 46 years of age. She was
14 41 years old at the time of the alleged amended onset date of
15 September 14, 2016, and 43 at the time of the administrative
16 hearing in this matter. She stands approximately 5 foot
17 5 inches in height. Her weight has fluctuated as much as 30
18 to 50 pounds. At the time she prepared her functional
19 report, she weighed 124 pounds. At the time of the hearing
20 she weighed 158 pounds. Plaintiff underwent bariatric bypass
21 surgery in 2016 and has had medically induced anorexia.
22 Plaintiff is married and lives with her husband in a mobile
23 home in Waddington, New York. She has two children who at
24 the time of the hearing in August 2018 were 17 and 23 years
25 of age. Neither of those children resides with the

1 plaintiff. Plaintiff has a high school degree and two years
2 of college education. While in school she attended regular
3 classes. Plaintiff is right-handed. She has a driver's
4 license but no car, her vehicle apparently was repossessed.

5 Plaintiff worked until September 2016 in various
6 positions, most of short duration, including as a cashier, a
7 merchandiser, a stocker, a team leader, a dairy
8 representative and dairy inspector, and a sales associate in
9 an appliance store.

10 Plaintiff suffers from physical and mental
11 diagnosed conditions. Mentally her conditions have been
12 variously diagnosed as bipolar II disorder, depressive
13 disorder with atypical features, post-traumatic stress
14 disorder, anxiety, and an adjustment disorder with
15 depression. She is not currently undergoing any specialized
16 treatment for her psychiatric condition except through her
17 general practitioner who prescribes medication. She did in
18 the past see the Canton-Potsdam Behavioral Health Services
19 facility as well as to obtain services from the Mosaic
20 Behavior Health Services.

21 Physically, plaintiff has been diagnosed as
22 suffering from fibromyalgia, psoriatic arthritis of long
23 standing, GERD, and a left shoulder issue. Plaintiff's
24 primary provider is Dr. Emily Wood who she has seen since
25 September of 2000 -- I'm sorry, November of 2016. She sees

1 Dr. Wood approximately every six to eight weeks. She has
2 also consulted with Dr. Juan-Diego Harris, a pain specialist,
3 Dr. Lai Kuang, another pain provider, and Dr. Eyal Kedar, a
4 rheumatologist. She has also seen various other physician's
5 assistants and nurse practitioners.

6 Plaintiff has been prescribed various medications
7 over time including Humira, Prozac, Savella, a Butrans patch,
8 oxycodone, Soma, Stelara, Percocet, Prilosec, and omeprazole.
9 She uses a cane, although Dr. Wood, her primary provider,
10 indicated at page 730 of the administrative transcript that
11 it is not required. She has also undergone radiofrequency
12 ablation, injections, she uses a TENS unit, she has tried
13 acupuncture and physical therapy. Plaintiff does not smoke.
14 She does occasionally use marijuana for her pain, she has not
15 been prescribed medical marijuana. Plaintiff does and has
16 consumed in the past alcohol and has had some issues with
17 regard to alcohol and has undergone some AA treatment.

18 In terms of activities of daily living over time,
19 she is able to shower and bathe, she can groom, she does some
20 driving, some laundry, cleans, she does some cooking, she
21 does dishes, she does not shop, she watches television,
22 reads, she plays with her two small dogs, she did at one
23 point attend her daughter's volleyball games, she has been to
24 one or more casinos in the past, and she walks.

25 Procedurally, plaintiff applied for Title II and

1 Title XVI benefits on September 15, 2016, alleging an onset
2 date of May 24, 2016. That was later amended to
3 September 14, 2016, the date on which plaintiff left her last
4 work. In support of her application, she claims disability
5 based on stomach pain and scar tissue from multiple
6 surgeries, gastric bypass side effects, depression,
7 arthritis, and fibromyalgia. A hearing was conducted on
8 August 28, 2018 by Administrative Law Judge Robyn L. Hoffman
9 to address plaintiff's application. Administrative Law Judge
10 Hoffman issued an adverse decision on February 21, 2019.
11 That became a final determination of the agency on March 4,
12 2020 when the Social Security Administration Appeals Council
13 denied plaintiff's application for review. This action was
14 commenced on April 15, 2020 and is timely.

15 In her decision, ALJ Hoffman applied the familiar
16 five-step sequential test for determining disability. She
17 noted initially that plaintiff was last insured on June 30,
18 2 -- or will be, 2022.

19 At step one, ALJ Hoffman concluded plaintiff had
20 not engaged in substantial gainful activity since
21 September 14, 2016. She did do some work subsequent to that
22 date but did not rise to a level of substantial gainful
23 activity. The administrative law judge noted, however, that
24 she did consider plaintiff's ability to work in an appliance
25 store when formulating the residual functional capacity. She

1 testified that there was some lifting involved as I recall.

2 At step two, ALJ Hoffman found that plaintiff does
3 suffer from severe impairments that impose more than minimal
4 limitations on her ability to perform work functions,
5 including fibromyalgia, lumbar facet arthropathy, psoriatic
6 arthritis, status post gastric bypass, and degenerative tear
7 of the acetabular labrum of the right hip.

8 At step three, ALJ Hoffman concluded that
9 plaintiff's conditions do not meet or medically equal any of
10 the listed presumptively disabling conditions set forth in
11 the Commissioner's regulations, specifically considering
12 Listings 1.02 and 1.04.

13 ALJ Hoffman next concluded that despite her
14 conditions, plaintiff retains the residual functional
15 capacity, or RFC, to perform less than a full range of light
16 work, imposing some limitations that are inconsistent with a
17 full range of light work, finding that she can occasionally
18 lift and carry 20 pounds, frequently lift and carry
19 10 pounds, sit for up to six hours and stand or walk for
20 approximately six hours in an eight-hour day with normal
21 breaks. She is limited to frequent reaching in all
22 directions, and the claimant should avoid concentrated
23 exposure to excessive amounts of respiratory irritants such
24 as dust, odors, fumes, gases, and hot and cold temperature
25 extremes.

1 Applying that residual functional capacity at step
2 four, the administrative law judge essentially bypassed the
3 step in light of the paucity of information concerning
4 plaintiff's past relevant work.

5 At step five, ALJ Hoffman concluded that if she
6 were able to perform a full range of light work, plaintiff
7 would be not disabled pursuant to Rule 202.21 of the
8 Medical-Vocational Guidelines set forth in the Commissioner's
9 regulations, the so-called Grids. She concluded that the
10 limitation to frequent reaching was not significant and that
11 plaintiff is able to use both hands to handle, finger, feel
12 and therefore can grasp, hold, and turn objects. She also
13 concluded that the limitation associated with the
14 environmental conditions does not significantly impact her
15 ability to work, citing Social Security Rulings 83-14 and
16 85-15. She therefore concluded that those additional
17 limitations did not sufficiently erode the job base on which
18 the Grids are predicated to make it necessary to secure the
19 testimony of a vocational expert and found that plaintiff was
20 not disabled at the relevant times.

21 As you know, the court's function is to determine
22 whether correct legal principles were applied and the result
23 is supported by substantial evidence, defined as such
24 relevant evidence as a reasonable mind would find sufficient
25 to support a conclusion. As the Second Circuit Court of

1 Appeals noted in *Brault v. Social Security Administration*
2 *Commissioner*, 683 F.3d 443 from 2012, this is an extremely
3 deferential standard. The standard is more stringent than
4 the clearly erroneous standard that we, as lawyers, are
5 familiar with. The Second Circuit noted that under the
6 substantial evidence standard, once an ALJ finds a fact, the
7 fact can be rejected only if a reasonable fact finder would
8 have to conclude otherwise.

9 The plaintiff, in support of her challenge, raises
10 four interrelated contentions.

11 The first is that, and the key focus, quite
12 honestly, is, surrounds the administrative law judge's
13 handling and treatment of the three forms completed by
14 plaintiff's treating physician Dr. Emily Wood. The argument
15 is that as a treating source, those opinions were entitled to
16 controlling weight, and that it was improper to elevate the
17 opinions of nontreating sources such as Dr. Hennessey and
18 Dr. Long and Occupational Therapist Graveline and
19 Dr. Lorensen over the opinions of Dr. Wood.

20 The second hinges on the first. It alleges that
21 the residual functional capacity is not supported by
22 substantial evidence because the opinions of Dr. Wood and
23 also Nurse Practitioner Couperus-Mashewske were improperly
24 rejected or discounted.

25 The third is, the third contention is that the ALJ

1 should have obtained the testimony of a vocational expert.
2 Again, it's dependent on the additional limitations set forth
3 in Dr. Wood's medical source opinions.

4 And the fourth is that substantial evidence does
5 not support the administrative law judge's rejection of
6 Dr. Lorensen's additional limitations of moderate to marked
7 limitation in bending, lifting, and reaching.

8 In terms of the treating source, Dr. Emily Wood in
9 August of 2018 completed three forms, primarily check-box
10 forms. Those appear at pages 720 of the record through
11 733 -- I'm sorry, 734, and they're extremely limiting. In
12 the first of those, the administrative law judge concluded
13 that plaintiff can walk for 10 minutes before needing a
14 break. The opinion also finds that plaintiff would be off
15 task 25 percent or more of the time and absent more than four
16 times per month and that plaintiff is incapable of even low
17 stress work, that's at page 724.

18 The second form, which focuses on plaintiff's
19 mental condition, is extremely limiting, finding marked
20 limitations in many areas and an extreme limitation in
21 plaintiff's ability to respond appropriately to usual work
22 situations and to changes in a routine work setting.

23 The third form focuses on plaintiff's physical
24 capabilities, finding that she can only occasionally lift up
25 to, and carry up to 10 pounds and can never lift or carry

1 more than 10 pounds. It finds that she can sit for only two
2 hours and stand for one hour and walk for one hour in an
3 eight-hour day. It concludes that she can never reach
4 overhead with left or right hand, can never push or pull with
5 the left or right hand. It finds also that she can never
6 climb ladders, scaffolds, balance, stoop, kneel, crouch, or
7 crawl. Environmentally it also concludes that she can never
8 be subject to unprotected heights, moving mechanical parts,
9 dust, odors, fumes, pulmonary irritants, extreme cold,
10 extreme heat, and vibrations.

11 The forms, as I indicated, were check-box forms
12 with little or no explanation.

13 The administrative law judge discussed and
14 summarized those reports at page 41, also discussed them at
15 page 36, and 41 and 42. It is true, as plaintiff argues,
16 that ordinarily as a treating source, Dr. Wood's opinions
17 regarding the nature and severity of plaintiff's impairments
18 would be entitled to considerable deference, provided they
19 are supported by medically acceptable clinical and laboratory
20 diagnostic techniques and not inconsistent with other
21 substantial evidence. Such opinions as those of Dr. Wood,
22 however, are not entitled to controlling weight if they're
23 contrary to other substantial evidence in the record,
24 including the opinions of other medical experts. And of
25 course it is for the administrative law judge to resolve

1 conflicts in the form of contradictory medical evidence under
2 *Veino v. Barnhart*, 312 F.3d 578, pin cite 588, and it's from
3 the Second Circuit 2002. If an ALJ doesn't give controlling
4 weight to a treating source's opinion, the ALJ must apply
5 various factors specified in 20 C.F.R. Sections 404.1527 and
6 416.927 to illuminate how much, if any, weight was given to
7 the treating source's opinion. In the Second Circuit,
8 they're called, so-called the *Burgess* factors. The failure
9 to apply the proper legal standards for considering treating
10 source opinions can provide a basis for reversal of an ALJ's
11 determination. The Second Circuit has somewhat tempered that
12 rule in *Estrella v. Berryhill*, 925 F.3d 90, Second Circuit
13 2019, and the cases that have come before and after *Estrella*,
14 noting that if the court is satisfied after reviewing the
15 administrative law judge's decision as a whole, the treating
16 source rule was not violated.

17 In this case, Administrative Law Judge Hoffman does
18 cite several reasons for discounting Dr. Wood's opinions.
19 She notes that they're not supported by treatment notes and
20 overall, the overall record, and that's at page 36 when it
21 comes to the mental conditions experienced by the plaintiff
22 and at page 42 when it comes to the physical, and some
23 examples are cited. And let me step back, I know that
24 plaintiff has argued that the administrative law judge, by
25 saying that certain opinions are not supported, medical

1 opinions that is, by treatment notes and records is playing
2 doctor, but it is also true under the regulations that an
3 opinion is entitled to controlling weight, for example,
4 treating source opinion, only if it is supported by
5 substantial evidence, including medical evidence, so it is
6 perfectly legitimate and proper for the administrative law
7 judge to make that analysis. The administrative law judge
8 did not, it is clear, rotely discuss the *Burgess* factors in
9 her decision, but she did point to some significant reasons
10 why she rejected Dr. Wood's opinions. They're internally
11 inconsistent when you look at them and focus on the walking,
12 how long plaintiff can walk before needing a break, two
13 different answers appear. Manipulation, again, inconsistent.
14 The off task, the 25 percent opinion that plaintiff would be
15 off task is speculative, there's no explanation given as to
16 the basis for that opinion.

17 The issue really is not, as most plaintiffs would
18 like to focus on, whether the court or plaintiff would deem
19 Dr. Wood's opinion controlling. The focus is on, is the
20 ALJ's determination supported by substantial evidence, or
21 would a reasonable fact finder have to conclude otherwise
22 than the administrative law judge did. And also, of course,
23 the court must be satisfied that the treating source rule was
24 not violated under *Estrella*. I note that these forms from
25 Dr. Wood are check-box forms with minimal explanation. Such

1 forms are notoriously not persuasive. Many courts have found
2 that such forms, without explanation, should be given
3 minimal, if any, weight.

4 This case is somewhat similar to another
5 fibromyalgia case in which the opinions of Dr. Lorensen, as a
6 matter of fact, were discounted, *Thomas Roy v. Commissioner*
7 *of Social Security*, 2020 WL 4365607, from the Northern
8 District of New York, Senior District Judge Gary L. Sharpe.
9 Again, it is clear in this case that there are contradictory
10 medical opinions and the weighing of those opinions is
11 entrusted in the administrative law judge under *Veino*. And
12 the administrative law judge, it's well accepted, can elevate
13 the opinions of other nontreating sources including Dr. Long,
14 Dr. Lorensen, over Dr. Wood, even though Dr. Wood is a
15 treating source, if they're more consistent with the notes of
16 exams and so forth.

17 I also note that there is an opinion, as counsel
18 noted, from an Occupational Therapist Ashleigh Graveline from
19 December 1, 2016, it appears at pages 589 through 621 of the
20 administrative transcript, based upon her examination of the
21 plaintiff and testing. She concludes at page 593 that the
22 plaintiff performed within the light work demand level as
23 defined and outlined in the Dictionary of Occupational
24 Titles. And although plaintiff argues that that was not
25 entitled to consideration since, as an occupational

1 therapist, Ms. Graveline is not an acceptable medical source,
2 the regulations are clear that such opinions can be
3 considered by an administrative law judge under 20 C.F.R.
4 Sections 404.1527(f)(1) and 416.927(f)(1). The next -- and
5 so I find that the treatment of Dr. Wood's opinions did not
6 run afoul of the treating source rule and was properly
7 explained.

8 The next argument is residual functional capacity
9 argument. Residual functional capacity represents a finding
10 of the range of tasks a plaintiff is capable of performing
11 notwithstanding her impairments. Ordinarily, the RFC
12 represents a claimant's maximum ability to perform sustained
13 work activities in an ordinary setting on a regular and
14 continuing basis, meaning eight hours a day for five days a
15 week or an equivalent schedule. An RFC determination must be
16 informed by consideration of all relevant medical and other
17 evidence.

18 In this case, the issue is not, again, whether some
19 evidence supports plaintiff's position but whether
20 substantial evidence supports the administrative law judge.
21 In other words, in many of these cases there can be two right
22 answers, substantial evidence can support a plaintiff's
23 argument and can also support an administrative law judge's
24 determination which is contrary to that argument. It is also
25 true that in formulating an RFC, an ALJ need not discuss

1 literally every shred of evidence. There are some facts
2 supporting plaintiff's position and she acknowledged as such,
3 but the administrative law judge, in formulating her RFC,
4 properly included plaintiff's rather fulsome activities of
5 daily living at page 39, records, medical records showing
6 that medications have controlled many of plaintiff's
7 conditions, including her psoriatic arthritis and her pain at
8 page 39. She cites relatively benign x-ray and MRI evidence
9 at pages 39 to 40. She cites medical exams showing
10 relatively benign findings at page 40. She relied on
11 Occupational Therapist Graveline's evaluation and
12 Dr. Lorensen's consultative opinions. Dr. Lorensen in her
13 consultative report, which appears at pages 411 to 415 of the
14 administrative transcript, she concludes that plaintiff
15 suffers from no gross limitations in sitting, standing,
16 walking, and handling small objects with the hands. She does
17 experience moderate to marked limitations for bending,
18 lifting, and reaching. The administrative law judge of
19 course did, and I'll get to that in a moment, not accept
20 Dr. Lorensen's opinion in whole which of course she's
21 certainly entitled to do. She's entitled to accept some
22 parts but not a whole of a medical opinion. The third
23 argument -- And so I don't -- I do find that the residual
24 functional capacity finding of the administrative law judge
25 is supported by substantial evidence.

1 The third argument is that a vocational expert
2 should have been called to fill in the void created by the
3 additional exertional and nonexertional limitations
4 experienced by the plaintiff. That argument really hinges
5 upon Dr. Wood's additional limitations and so the argument
6 fails since I have already found that her opinions were
7 properly discounted.

8 The last issue pertains to the treatment of
9 Dr. Lorensen's opinion and specifically surrounds the
10 limitation, the moderate to marked limitation in bending,
11 lifting, reaching. The administrative law judge acknowledged
12 it but found it is not supported at page 41, and in doing so,
13 she relied upon Occupational Therapist Graveline's opinion
14 and plaintiff's activities of daily living. She explained
15 the rejection of the moderate limitation in reaching.

16 The case is very similar to, as Commissioner
17 argued, *Dierdre R. v. Commissioner of Social Security*, 2018
18 WL 4565769 from Administrative Law Judge -- I'm sorry, from
19 Magistrate Judge Thérèse Wiley Dancks. In note 7 of her
20 decision, Judge Dancks also notes that moderate to marked
21 limitations does not necessarily preclude the performance of
22 light work. So if, and I say only if because I do think that
23 rejection was properly explained and supported by substantial
24 evidence, but if Dr. Lorensen's limitation on reaching were
25 to have been accepted, or should have been accepted, it would

1 be a harmless error since under *Dierdre*, as well as *Babcock*
2 *v. Berryhill*, 2018 WL 4347795, note 13, in that case it was a
3 moderate restriction in bending and lifting, does not
4 preclude light work. It's also supported by *Moxham v.*
5 *Commissioner of Social Security*, that's 2018 WL 1175210, at
6 *8. In that case, the consultative expert, Dr. Magurno,
7 opined that plaintiff had marked limitations in squatting,
8 lifting, carrying, and mild limitations for walking,
9 standing, sitting, and bending, and the judge in that case,
10 Magistrate Judge Daniel J. Stewart, concluded that plaintiff
11 had failed to illustrate how those marked limitations in
12 those areas would be inconsistent with light work. So, and I
13 guess as a backdrop, we have to bear in mind that it is
14 always the plaintiff's burden at least through step four to
15 establish additional limitations that were not accounted for
16 in the residual functional capacity. In this case, I find
17 that burden was not met.

18 So in conclusion, I find that the administrative
19 law judge's decision resulted from the application of proper
20 legal principles and is supported by substantial evidence. I
21 will grant judgment on the pleadings to the defendant and
22 order dismissal of plaintiff's complaint. Again, thank you,
23 both counsel, I hope you enjoy your summer.

24 MR. HASSELER: Thank you, your Honor.

25 MR. HENRY: Thank you, your Honor.

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CERTIFICATE OF OFFICIAL REPORTER

I, JODI L. HIBBARD, RPR, CRR, CSR, Federal
Official Realtime Court Reporter, in and for the
United States District Court for the Northern
District of New York, DO HEREBY CERTIFY that
pursuant to Section 753, Title 28, United States
Code, that the foregoing is a true and correct
transcript of the digitally-recorded proceedings
held in the above-entitled matter and that the
transcript page format is in conformance with the
regulations of the Judicial Conference of the United
States.

Dated this 9th day of July, 2021.

/S/ JODI L. HIBBARD
JODI L. HIBBARD, RPR, CRR, CSR
Official U.S. Court Reporter